

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

**In the Matter of a Commission Initiated  
Investigation into U S WEST  
Communications, Inc.'s Costs Related  
to Provision of Line Sharing Service.**

**FIFTH PREHEARING ORDER**

This matter came before Administrative Law Judge Steve M. Mihalchick on April 10, 2000, on the Motion of Covad, JATO, NorthPoint, and New Edge Network to Limit Issues to be Determined in this Proceeding.

Based upon the files and the argument of counsel, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

1. The Motion of Covad, JATO, NorthPoint, and New Edge Network to Limit Issues to be Determined in this Proceeding is GRANTED. Specifically, no evidence regarding OSS costs or loop conditioning costs associated with line sharing will be admitted in this proceeding.
2. The foregoing Order will not be certified to the Public Utilities Commission.
3. The hearing will proceed on the established schedule.

Dated May 18, 2000

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STEVE M. MIHALCHICK  
Administrative Law Judge

**MEMORANDUM**

**Background**

On March 17, 2000, Covad, JATO, NorthPoint, and New Edge Network (the CLECs) filed a Motion to Limit Issues requesting partial summary disposition<sup>[1]</sup> on two

issues. The first was that determination of OSS costs was premature under determinations made in the Generic Cost Docket and should not be considered in this proceeding. The second was that line conditioning costs were previously determined not to be recoverable in the Generic Cost Docket and therefore should not be allowed or considered in this proceeding. Responses were filed by U S WEST and the Department of Commerce and argument on the motion was held on April 10, 2000. U S WEST opposes the motion, the Department supports the motion.

## **OSS**

The development of U S WEST's operation support system (OSS) to allow the CLECs to order and manage services from U S WEST was described in the affidavits of Penny Bewick and Barbara Brohl and other documents attached to the Motion and U S WEST's Response. While U S WEST has continued to invest large amounts of money modifying and improving its OSS, it still has not reached the point where the system is as automatic and free of the need for human intervention for the CLECs as it is for U S WEST itself. Thus, the CLECs still do not have nondiscriminatory access to U S WEST's OSS, nor can U S WEST produce reliable cost figures because the necessary upgrades have not been completed.

In the Generic Cost Docket,<sup>[\[2\]](#)</sup> the Commission determined that U S WEST is not entitled to recover OSS costs until it provides nondiscriminatory access and provides reliable cost support. That determination was based at least in part upon the requirement of 47 U.S.C. § 251(c)(3) for nondiscriminatory access. That requirement still applies and the prior determination must be followed.

U S WEST argues that the facts in the current proceeding are distinguishable because of the huge investment that has been made and progress in the OSS that has occurred over the two years since the hearing in the Generic Cost Docket. There is some merit to the argument; the likely OSS development costs can be better estimated now and there will be a need to apportion part of those costs to the CLECs in the future. But there still is not nondiscriminatory access to the OSS and that statutory criteria remains. The flip side of the argument is that nondiscriminatory access has been required for more than two years and U S WEST still hasn't provided it. It would be counterproductive to the goal of promoting competition to ease up on the requirements now. There is no reason to depart from the determinations made in the Generic Cost Docket.

## **Loop Conditioning**

As to loop conditioning costs, the CLECs, joined by the Department, argue that the determination made in the Generic Cost Docket controls. That determination was that loop conditioning cost must be considered as included within the price of a loop as an unbundled network element as determined by the approved cost model. Thus, no separate loop conditioning charge was allowed.

U S WEST points to several provisions in the FCC's Federal Line Sharing Order<sup>[3]</sup> and regulations that say ILECs should be able to charge for conditioning loops.<sup>[4]</sup> The CLECs counter that the Federal Line Sharing Order also provides that it does not authorize an ILEC to impose line conditioning charges where the ILEC has previously agreed, or is obligated, not to charge for line conditioning.<sup>[5]</sup> The Commission's order in the Generic Cost Docket imposed exactly that obligation. Moreover, in the U S WEST and Qwest merger docket settlement, U S WEST has agreed with the Department that it will not charge loop conditioning charges. Thus, the Federal Line Sharing Order does not mandate that U S WEST be allowed to charge for loop conditioning.

U S WEST also argues that requiring it to condition lines, but not be compensated for such conditioning, would result in an unconstitutional taking. But U S WEST makes no claim that there are particular loop conditioning costs for loops carrying dsl data beyond those for the same loops if they were not carrying dsl. And since it was determined in the Generic Cost Docket that the price set there for loops covered the cost for conditioned loops, U S WEST is indeed being paid for the loop conditioning costs that are incurred. There is no taking.

## **Certification**

All parties have requested that the ruling on this motion be certified to the PUC.<sup>[6]</sup> But there are several reasons it should not be certified. First, the motion does not involve a controlling question of law on which there is substantial ground for a difference of opinion. The prior recommendations of this ALJ and the decisions of the Commission have been consistent and no circumstances exist that justify changing them. As further evidence that the Commission position on the OSS issue has not changed, the Commission has established a separate process in U S WEST's 271 docket to determine when U S WEST is providing nondiscriminatory access.

Second, waiting until after the hearing does not render the matter moot or render a reversal meaningless. Whether the PUC were to reverse the Administrative Law Judge on this issue or not, U S WEST will have a chance to present its evidence and will be allowed to recover its appropriate OSS costs from the CLECs. For the same reason, there is no need to certify the motion to promote the development of a full record or avoid remanding.

Lastly, the issues presented are not solely within the expertise of the agency. The issues presented are legal issues, and administrative law judges are required by the APA to make recommendations on legal conclusions as well as on findings of fact. Moreover, while the subject is legally and technically complex, it is within training and experience of the Administrative Law Judge.

For all these reasons, the motion will not be certified to the PUC.

## Postponement

U S WEST requests that if the motion is granted, that the entire hearing be postponed until all the issues can be heard. That is not appropriate. The OSS costs will be determined at an appropriate time. The loop conditioning costs will not be considered at any time. Nothing would be gained by delay.

SMM

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<sup>[1]</sup> An administrative law judge may recommend summary disposition of a contested case or any part thereof where there is no genuine issue as to any material fact. Minn. R. 1400.5500 K. The standards applicable to motions for summary disposition in district court are generally applied to such motions.

<sup>[2]</sup> *In the Matter of a Generic Investigation of U S WEST Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, MPUC Docket No. P-422, 5321, 3167, 421/CI-96-1540(May 3, 1999).

<sup>[3]</sup> *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, (Dec. 9, 1999).

<sup>[4]</sup> Federal Line Sharing Order ¶¶ 144, 82, 87, 148; 47 C.F.R. Part 51.

<sup>[5]</sup> Federal Line Sharing Order ¶ 82, fn. 188.

<sup>[6]</sup> Minn. R. 1400.7600 allows for certification of motions to an agency under certain circumstances.